

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ZOSTAVAX (ZOSTER	:	MDL NO. 2848
VACCINE LIVE) PRODUCTS	:	
LIABILITY LITIGATION	:	
_____	:	
	:	
THIS DOCUMENT RELATES TO:	:	
	:	
PHYLLIS LYONS	:	CIVIL ACTION NO. 19-3473
	:	
v.	:	
	:	
MERCK & CO., INC. & MERCK	:	
SHARP & DOHME CORP.	:	
_____	:	_____

MEMORANDUM IN SUPPORT OF PRETRIAL ORDER NO. 486

Bartle, J.

July 11, 2023

Defendants Merck & Co., Inc. and Merck Sharp & Dohme Corp. ("Merck") have moved to dismiss the above action for failure to provide authorizations. Plaintiff has not filed any opposition to the motion.

This action is one of the Group C cases in this MDL. Group C cases are those in which the plaintiff alleges to have suffered a hearing loss as a result of having received a Zostavax vaccine injection. Under Pretrial Order No. 46, plaintiffs are required to produce authorizations for Merck to obtain records from entities identified in plaintiff's Fact Sheets. Merck requested certain authorizations at the end of March 2023, but plaintiff did not return the authorizations

within the seven days required under Pretrial Order No. 46. Merck filed a motion to compel which the court granted on May 15, 2023. In Pretrial Order No. 475 the court ordered plaintiff to serve the medical release authorizations by May 22, 2023. The court stated in its Order that if plaintiff did not comply, the "action may be dismissed in whole or in part or the plaintiff may be prohibited from introducing relevant materials into evidence." No authorizations have been forthcoming.

The court cannot emphasize enough the importance of compliance with Pretrial Order No. 46 requiring plaintiffs to provide authorizations to Merck to obtain plaintiff's medical and other records. This MDL currently consists of approximately 900 cases. Without compliance with this critical step, cases in this MDL cannot move forward. Without compliance, Merck is placed in the onerous position of having to file motions to compel or dismiss, to say nothing of the management and time-consuming burden placed on the court.

Merck has established that the relevant factors under Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 868-70 (3d Cir. 1984), have been satisfied. The plaintiff has been dilatory, has been warned, has not acted in good faith, and has caused prejudice to Merck. The only effective remedy is dismissal.